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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 452.

GEORGE A. ADAMOS, Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

PETITIONER'S BRIEF.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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BATAVIA, N. Y.
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NEW YORK LIFE INSURANCE COMPANY.

PETITIONER'S BRIEF.

This case comes to this Court on a writ of certiorari to review a decree (R. 258) of the United States Circuit Court of Appeals for the Third Circuit entered on July 10, 1934, affirming the decree (R. 235) of the United States District Court for the Western District of Pennsylvania, dated November 4, 1933, and made by Judge Schoonmaker, ordering that the policies of insurance on which petitioner brought suit against the respondent be cancelled and rescinded.

Opinions Below.

The opinion of the District Court is in 5 F. Supp. 278, (rehearing denied, 5 F. Supp. 1019), and is found at page 227 of the record. The opinion of the Circuit Court of Appeals is reported at 71 F. (2d) 997 and is found at page 257 of the record.

Jurisdiction.

Jurisdiction to review this case is found in the provisions of sec. 240-a of the Judicial Code as amended by the Act of February 13, 1925 c. 229, sec. 1, 43 Stat. 938; (28 USCA sec. 347).

The statute involved is sec. 274 (b) of the Judicial Code (28 USCA Sec. 398, Act of March 3, 1915, c. 90, 38 Stat. 956) which provides as follows:

> "Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

The judgment of the Circuit Court of Appeals was entered on July 10, 1934. The petition for a writ of certiorari was filed on October 8, 1934 and was granted on November 12, 1934. The said judgment affirmed the decree (R. 235) of the District Court, ordering that policies of insurance on which petitioner had brought suit against the respondent be cancelled and rescinded, the defense of fraud made in the affidavit of defense, in an action at law, having been heard by a chancellor according to equity procedure pursuant to an order made on October 9, 1933 (R. 35).

The Questions Presented.

1. Is section 274(b) of the Judicial Code (28 USCA Sec. 398) to be given effect merely as a procedural statute, or as one extending the jurisdiction of the federal equity court to cases over which it had no jurisdiction prior to said enactment?

2. If a person had no right, prior to the enactment of section 274(b) of the Judicial Code, to apply to a court of equity for relief by bill, has he, because of said enactment, the right to have his case tried, as in equity, before a chancellor by first setting up those facts as a defense in an action at law, and then moving to try that defense, as in equity?

3. If the statute is to be so construed, would it not be a violation of the Seventh Amendment to the Constitution of the United States?

4. Is a party to be denied his right to a trial by jury which he undoubtedly had before the enactment of section 274(b) of the Judicial Code, by reason of said enactment?

Statement.

On December 22, 1932, petitioner filed a suit at law in the Court of Common Pleas of Allegheny County, Pennsylvania, to recover the sum of $20,000.00 on four life insurance policies for the sum of $5,000.00 each, dated April 8, 1932, issued by respondent on the life of Andy Adamos, father of petitioner, who died on July 6, 1932 (R. 3).

On February 3, 1933, respondent caused this suit to be removed to the District Court of the United States for the Western District of Pennsylvania (R. 1).

On February 15, 1933, respondent filed an affidavit of defense (R. 9) in which it set up the defense that the insured obtained said policies by means of false and fraudulent answers to questions contained in the application. In the affidavit of defense there was included a paragraph in which respondent prayed by way of equitable relief that the policies be surrendered, cancelled and rescinded.

On September 8, 1933, respondent filed a petition for a hearing in equity (R. 30), claiming that an equitable issue is raised by the pleadings which should be adjudicated by a chancellor according to equitable procedure, without a jury, and preferably in advance of a jury trial at law, pursuant to Sec. 274(b) of the Judicial Code (28 USCA Sec. 398). On the same day a rule was granted on petitioner to show cause why the prayer of the petition should not be granted.

On September 18, 1933, petitioner filed an answer to said petition in which he averred that the alleged equitable defense is not an equitable defense sufficient to transfer the suit from the law to the equity side of the court but that it is a defense of fraud triable at law and he therefore prayed that the petition be dismissed.

On October 9, 1933, the court entered an order making absolute the said rule to show cause. On the same day the court granted an exception to petitioner to said order.

On November 4, 1933, after hearing the alleged equitable issue under Sec. 274(b) of the Judicial Code, as chancellor, the court made a decree ordering the said policies to be cancelled and rescinded and the respondent discharged of all liability on account of said pol-

icies and directing petitioner to surrender said policies to respondent.

On July 10, 1934, the Circuit Court of Appeals filed an opinion affirming the decree of the District Court entered on November 4, 1933.

On November 12, 1934, this Court granted this writ of certiorari.

Specifications of Error.

1. The Circuit Court of Appeals erred in not reversing the order of the District Court dated October 9, 1933.

2. The Circuit Court of Appeals erred in not reversing the decree of the District Court entered November 4, 1933.

3. The Circuit Court of Appeals erred in affirming the decree of the District Court dated November 4, 1933.

4. The Circuit Court of Appeals erred in not holding that the petition for a hearing in equity should have been denied.

Summary of Argument.

Section 274 (b) of the Judicial Code (28 USCA sec. 398) does not authorize the application made by respondent to have its defense of fraud made in its affidavit of defense, in an action at law, heard by a chancellor, according to equity procedure.

Respondent, on the facts presented by the record, has no right to equitable relief.

If section 274 (b) of the Judicial Code is to be construed as to extend the jurisdiction of the federal equity court to situations over which it had no jurisdiction prior to said enactment, it is in violation of the seventh amendment to the constitution of the United States.

ARGUMENT.

Completeness of respondent's remedy in law suit.

Petitioner is the only person having an interest in the policies sued on. A judgment in favor of respondent on its defense in the law suit will terminate its liability on the policies. Respondent has not, in its affidavit of defense (R. 9), or in its petition for hearing in equity (R. 30), made any claim to the contrary.

In Phoenix Mutual Life Ins. Co. vs. Bailey, 80 U. S. 616, this court has ruled that the defense that a policy was obtained by means of false representations is, if true, a good defense at law and that the defendant has no occasion to resort to a court of equity for relief, there being no special circumstances to show that it may suffer irreparable injury if it is denied

a preventative remedy or that the defense, at law, is not as perfect and complete as in equity.

See also Cable vs. United States Life Insurance Co., 191 U. S. 288, Buzzard v. Houston, 119 U. S. 347, and Hipp v. Babin, 19 How. 271. In the last cited case the court said (p. 22):

> "And * * * whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

> "A charge of fraud or false representation will not give a court of equity jurisdiction where complete relief on that ground can be obtained in a court of law. See Adams v. Jones (C. C. A.) 11 F. (2d) 759, and authorities there cited, including the leading case of Buzzard v. Houston, 119 U. S. 347, 7 S. Ct. 249, 30 L. Ed. 451."

> Central Florida Lumber Co. v. Taylor-Moore Syndicate, 51 F. (2d) 1.

> "Court of equity should not order cancellation of insurance policy procured by fraud, where facts indicate that fraud could be used as defense to action at law on policy. (28 USCA Sec. 384.)"

> Harnischfeger Sales Corporation v. National Life Ins. Co., 72 F. (2d) 921 (C. C. A. 7).

In the absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained: Schoenthal vs. Irving Trust Co., 287 U. S. 92 and section 267 of the Judicial Code (28 USCA Sec. 384).

Respondent has not pleaded that it is without remedy at law, nor has it set up any facts to show that

it is in need of equitable relief. Since respondent, under the facts of this case, had no right to file a bill in equity to cancel the policies before the statute was enacted, it cannot now have its defense treated as a controversy in equity triable before a chancellor.

Meaning of "Equitable defense" as used in statute.

Respondent's defense is not an equitable defense within the meaning of the statute. Ballantine's Law Dictionary, at page 440, defines an "equitable defense" as follows:

> "Any matter which would authorize an application to a court of chancery for relief against a legal liability, *but which at law could not be pleaded in bar.* That is, a defense which is recognized by courts of equity, acting *solely* upon the inherent rules and principles of equity, altogether outside and independent of those rules and defenses which obtain in a court of law. The defense of laches is such an equitable defense." (Italics ours.)

Mr. Justice Cardozo defined "equitable defenses" in Petrogradsky Mejdunarodny Kom. Bank v. National City Bank, 253 N. Y. 23, and in Susquehanna S. S. Co. Inc. v. A. O. Anderson & Co. Inc., 239 N. Y. 285, similarly. In the latter case he said: "With us, the rule is that—

> 'Under the head of equitable defenses are included all matters which would have before authorized an application to a Court of Chancery for relief against a legal liability *but which at law could not have been pleaded in bar.*'" (Italics ours.)

The term "equitable defenses", within the meaning of section 274(b) of the Judicial Code, has been similarly defined in Ford v. Huff, 296 Fed. 652 (C. C. A. 5th Cir. Cert. refused 266 U. S. 602).

Only formal distinction abolished.

In considering this statute, the court, in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235, at p. 242, made clear that in statutes of this character only the *formal* distinction between proceedings in law and equity is abolished. "Neither legal nor equitable remedies are abolished under such codes. 'What was an action at law before the code is still an action founded on legal principles, and what was a bill in equity before the code is still a civil action founded on principles of equity.' Sutherland, Code Pl., Pr. & Forms, Sec. 87." The court then adverted to the "most important limitation upon a Federal union of the two kinds of remedies in one form of action", namely, the Seventh Amendment to the Constitution of the United States preserving the "right of trial by jury."

In Smith v. American Nat. Bank, 89 Fed. 832 (C. C. A. 8th Cir.) the court, at page 838, after quoting the seventh amendment of the constitution,* said:

> "The effect of this provision is to declare that the right of trial by jury shall depend neither on legislative nor judicial discretion. In the absence of this provision, this right might be impaired (1) by the organization of courts in such manner as not to secure it to suitors; (2) by authorizing courts to exercise, or by their assumption of, equity or admiralty jurisdiction over cases at law."

In Union Pacific Railroad Company vs. Syas, 246 Fed. 561, 565, (C. C. A., 8th Cir.), the court said:

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* "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment VII to the Constitution of the United States.

> "This statute (sec. 274b of the Judicial Code) brings into the federal courts the procedure that has long prevailed in many of the states where Codes of Civil Procedure have been adopted. The statute is intended to prevent a circuity of action by allowing the rights of either party to an action at law, whether legal or equitable, in respect to one subject-matter, to be determined in one action; but, while the statute permits the granting of equitable relief in an action at law, Congress did not intend, in our opinion, to change in any way, except as to procedure, the essential distinction between law and equity. Basey v. Gallagher, 20 Wall. 670, 22 L. ed. 452, and Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800."

Conflicting constructions of Sec. 274(b).

In the case of New York Life Insurance Company vs. Miller, decided by the Circuit Court of Appeals of the 8th Circuit on October 25, 1934, (not yet reported,—for copy of opinion see Appendix), the facts were as follows:

Gertrude V. Miller brought an action against the insurance company to recover on two policies of insurance. The defendant filed an *answer setting out the same defense* as was interposed by respondent in this case. The defendant also filed a cross-bill praying for a decree of rescission and for general relief. In the replication to the cross-bill, plaintiff admitted that the assured had made the answers to the questions as alleged and denied their falsity and materiality, etc., and also alleged that the defendant had an adequate remedy at law. When the case was reached for trial, the defendant moved that the case be set for trial before the court on the equitable issues tendered for trial by the cross-bill. This motion was overruled and an exception noted. Later trial was

had to a jury resulting in a verdict and judgment for the plaintiff. The Circuit Court of Appeals affirmed the action of the district court.

The Circuit Court of Appeals for the Fifth Circuit had before it the question here involved in the cases of American Cyanamid Company v. Wilson & Toomer Fertilizer Company, 62 F. (2d) 1018 (certiorari denied 289 U. S. 735), and Phillips-Morefield, et al. v. Southern States Life Insurance Company, 66 F. (2d) 29, and reached diametrically opposite conclusions in the two cases.

In the American Cyanamid case the defendant, after filing an answer to a law action, filed a so-called equitable plea which alleged fraud and prayed the court, sitting as chancellor, to take jurisdiction, require a reply as provided by statute, and, on final trial, annul and cancel the plaintiff's claim, and that, pending such determination as the chancellor will make, proceedings on the law side of the court be suspended as though enjoined by bill in equity. In refusing the prayers, the court, at page 1020, said:

> "Equity is not over objection to assume jurisdiction because of either (equitable estoppels and questions of fraud) if the remedy at law is plain, adequate and complete; *nor will a prayer for an unnecessary cancellation serve as an excuse* (citing cases). The prayer for a cancellation of Wilson & Toomer Company's claim against Cyanamid Company may be put aside. A judgment at law for the defendant will effectually end it. One for the plaintiff will merge it. There is no written instrument capable of future harm to be cancelled." (Italics ours.)

In the Phillips-Morefield case, the court said:

> "The principal contention of appellant is that the equitable plea was improperly allowed, on the

> ground that the defenses set up therein could have been urged at law. Therefore the insurance company had an adequate remedy at law, and, by maintaining the plea, she was deprived of a trial by jury. In support of this appellant relies upon the cases of N. Y. Life Ins. Co. v. Marshall, 23 F. (2d) 225, decided by this court, and Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501. Those cases may be easily distinguished. In each case it appeared that a separate bill in equity had been filed for the cancellation of a life insurance policy, and there was an action at law pending on the policy. It was held that the grounds for cancellation of the policies alleged in the bills could be urged in defense in the pending suits at law. The bills were dismissed on the ground that the insurance companies had an adequate remedy at law. The situation is different when an equitable defense is interposed in an action at law, under the provisions of the Act of March 3, 1915, adding section 274b to the Judicial Code (28 USCA Sec. 398)."

The opinion in the American Cyanamid case, we submit, is well reasoned. The opinion in the Phillips-Morefield case gives no reason for its conclusion. It merely says the situation is now different from what it was when the cases of N. Y. Life Insurance Co. v. Marshall, 23 F. (2d) 225 and Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616 were decided because of the passage of the Act of March 3, 1915, section 274(b) of the Judicial Code. It does not explain in what respect the situation is now different. Its strange conclusion is at variance with what this court said in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235.

The Circuit Court of Appeals in our case disposed of this question in a sentence, as follows (R. 257):

> "In answer thereto the insurance company, in pursuance of Section 274(b) of the Judicial Code, 28 U. S. C. A. 398, and in accord with Ene-

> low v. New York Life Insurance Co., No. 5414 of this Court, 70 Fed. (2d) 728, prayed equitable relief by cancelling the policies in question on the ground of fraud."

In the Enelow case, *supra*, the court, in a *per curiam* said:

> "The purpose of the Act was to do away with the necessity of appealing to a Court of Equity as such by permitting equitable defenses to be pleaded and heard in all actions at law. There was no need for such an Act in Pennsylvania for the reason that equitable defenses were always permitted in actions in assumpsit in that State and were determined by the Trial Court with the assistance of a jury as if the Court and Jury were sitting as a Chancellor. The Act of Congress applies to actions in Pennsylvania whether needed or not."

It was not our contention in the Enelow case that the order appealed from was improper because the statute was not needed in Pennsylvania. We based our objection on the ground that respondent had an adequate remedy at law and that it could not have invoked the aid of a court of chancery to grant it relief. If the cause had been permitted to remain in the Pennsylvania court, it would not be tried "by the Trial Court with the assistance of a jury as if the Court and Jury were sitting as a Chancellor". It is difficult to perceive how a court and jury could sit as a chancellor. If this case were tried before a court and jury in Pennsylvania, their respective functions would be precisely the same as that of a court and jury in any other law suit. The jury would not be sitting, merely, to advise the conscience of a chancellor. Their verdict, on the facts, would be as binding as in any action at law.

New York Life Insurance Company vs. Marotta, 57 F. (2d) 1038, (C. C. A. 3rd Cir.), did not have our side of the case presented to the Circuit Court of Appeals. We have examined the appellees' brief in that case and find that the appellees entirely ignored the question whether, under a situation such as presented here, the court could under sec. 274(b) of the Judicial Code dispose of the defense as a case in equity. This proposition was Point III of the appellant in that case. What the appellees had to say on that point is found on pages 16 to 18 of their brief. They seem to go along with the appellant, the insurance company, on that question, and therefore do not refer to the cases which hold that in such a situation the defendant has an adequate and complete remedy at law, and that being so, for the court to dispose of the defense of fraud, sitting as a court of equity, would offend against the Seventh Amendment to the Constitution of the United States. The only thing they did say upon the subject was that, according to the record, the court acting *as a chancellor* did *apparently* dispose of that issue. The court only heard one side of that question,—the insurance company's side.

The editor of the United States Code Annotated, in a note to Title 28, sec. 398, in the 1933 Cumulative Annual Pocket Part makes a conjecture that the word "of" was inadvertently used in sec. 274(b) of the Judicial Code for the word "or". That statement is due to a superficial reading. It is plain that the draftsman of the Act was referring to a defense which embodied a prayer for equitable relief, that is, affirmative relief. The sentence would be crude if it read as suggested, namely, "The defendant shall have the same rights in such case as if he had filed a bill em-

bodying the defense *or* seeking the relief prayed for in such answer or plea." The draftsman did not mean a defense which consisted of nothing more than an assertion that a money judgment should not be entered against the defendant because the instrument sued on was obtained from him by fraud. That he used the right word cannot be open to doubt when the purpose sought to be accomplished by the statute is perceived. The editor says that the word "of" appears in the original statute.

Exceptions to rule against bills to cancel.

We do not contend that insurance companies can under no circumstances file bills to cancel policies on the ground of fraud. When a policy contains a provision that it shall be incontestable, except for nonpayment of premiums, after a certain period, courts have allowed insurance companies to make a contest, within the contestable period, by filing a bill to cancel. The ground for jurisdiction over such bills, however, is not as counsel for respondent claims "because the defense is clearly an equitable one", for, as we have shown, this court in the case of Phoenix Mutual Life Insurance Company vs. Bailey, *supra*, said that federal courts of equity do *not* have jurisdiction of bills to cancel policies for fraud where that charge can be made fully effective as a defense to a suit at law. In other words, it was because of an entirely different principle of equity jurisprudence that the bills were entertained, viz.: that the plaintiff had *no* adequate remedy at law for it was within the power of the holder of the policy to postpone the bringing of the suit until after the contestable period had expired.* And even if a suit

* Harnischfeger Sales Corporation v. National Life Ins. Co. supra.

to recover on a policy was brought within the contestable period, *if all of the parties having an interest in the policy were not included as plaintiffs,* a judgment that the policy was obtained by fraud would not be binding against the absent parties. Insurance companies were, therefore, permitted in such exceptional cases to maintain bills to cancel policies, notwithstanding the institution of the prior action at law against them.

In all of the *reported* cases, except one, that we have come across where a bill to cancel a policy was sustained, the bill was either filed *before* the lawsuit was brought on the policy, or if it was filed after the suit the lawsuit *did not have in it as plaintiffs* all of the persons having an interest in the policy. The overwhelming number of cases where federal courts have held that bills to cancel policies were maintainable were those of the first class above referred to, namely, those in which the bill was filed *before* any action at law was instituted.

In New York Life Ins. Co. v. Hurt, 35 F. (2d) 92, the court held that the "contest" contemplated in incontestable clauses of life insurance policies may be made either by equitable action to cancel policy or by answer in the suit at law brought to recover under the policy, citing a number of cases which it termed "the great number and weight of authority" on the point.

The point of that decision is that what the respondent in this case has done, namely, to file a defense setting up the alleged fraud, *is* the initiation of a contest; that it *had* put itself within the protection afforded it by the policy, and that regardless of whatever becomes of that lawsuit, respondent has made a contest within

the contestable period upon the grounds set forth in the affidavit of defense. There is therefore gone, so far as this case is concerned, *the entire basis* upon which courts of equity have been entertaining bills to cancel insurance policies.

As stated, the Hurt case also belongs to the second class of cases referred to by us above, cases where the insurance company pleads that it ought to be allowed to maintain a bill, notwithstanding the institution of the prior lawsuit, because it is seeking relief *against someone else besides the plaintiff in the lawsuit.* That cannot be here. If the policy in the case at bar be cancelled by a chancellor, the decree runs against the plaintiff in the lawsuit,—no one else.

In the Hurt case the *assignees* of an insurance policy first brought an action at law. The company then *filed a bill* praying cancellation for fraud not only against the assignee, but also against the widow as "the first person to be entitled to be named as administrator of the estate of" the assured. The court said on this point (p. 95):

> "Does the fact that the defense might have been made by answer, within the period, nullify the effect of filing the equitable action and thus deprive the company of the defenses set up in such action? We think not under the circumstances of this case. Here the law action on the policy was brought by the assignees thereof alone. The policy was assignable, but was issued in favor of 'The Executors, Administrators or Assigns of the Insured, or to the duly Designated Beneficiary.' The company had the right to protect itself against all claims from any one upon the policy. In the law action, such protection was only against the assignees who were the only plaintiffs therein at the time. The only way in which it could be sure of complete protection was by bringing

its equitable action and making the administratrix a party thereto."

There was considerable of a complication in that case. The assignees of the policy brought the law action first. The company then filed a bill to cancel, but within the contestable period. It also filed an answer to the law suit, but this answer was filed *after* the expiration of the contestable period. The answer included the matters averred in the bill. Thereafter the two cases were consolidated. The lower court *denied* a motion of the company to proceed to a hearing in the equity suit and *sustained* a motion for judgment for the plaintiffs in the law action *because the answer to the law action was filed after the contestable period had expired.* In other words, the lower court held at one and the same time that the bill should be dismissed because the complainant had at the time it was filed an adequate remedy at law, to wit, a right to attack the policy in the law suit, and deprived the company of the defense of fraud in the law action because the answer to the law action was filed too late. The Circuit Court of Appeals reversed and said the proper procedure under the circumstances here was to try the law case before acting upon the equitable action but in a trial of the law case the equitable defense should have been first disposed of. Under the special and extraordinary circumstances of that case we do not question the correctness of the action of the Circuit Court of Appeals in not following the lower court, *which denied the insured a chance to present its defense of fraud in either action.*

In Peake vs. National Life Insurance Co., 15 F. (2d) 303 (C. C. A. 8th Cir.), the court sustained a bill to cancel which was filed *before* a law suit, but made it

clear that it would have dismissed the bill, if *the law suit* had been, as in the case at bar, filed first. The court said:

> "Appellants contend that (1) Mrs. Peake's claim is a legal demand and appellee could make its defense of fraud and deceit to that action as a legal defense, and thus had a remedy at law, Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; (2) the insurer's claimed equitable right and remedy are fully set up in an answer to Mrs. Peake's action, filed within the two years' time named in the incontestable clause of the policy, and those rights can be adjudicated in that action, hence there was no occasion to enjoin the prosecution of that action, U. P. Ry. Co. v. Syas, 246 F. 561, C. C. A. 531; and (3) * * *
>
> *"If Mrs. Peake had brought her action before the equity suit had been instituted, and if it were established that she and the insurer were the only parties interested in the subject, the first two propositions contended for might be conceded as sound."* (Italics ours.) Opinion, pp. 304, 305.

Respondent says in its brief in opposition to certiorari (p. 7): "There was no provision in the law when those cases (Phoenix Mutual, *supra*, Cable, *supra*, Buzzard vs. Houston, 119 U. S. 347, and Hipp vs. Babin, 19 How. 271) were decided for the introduction of equitable defenses in actions at law". Does respondent mean to contend by this that if A brought a suit at law against B to recover the price of a mine which he sold to B, and the latter defended on the ground that he was induced to buy it by false and fraudulent representations made by A, that such defense could not be heard, and that judgment must go for the plaintiff regardless of the defense? Or does it mean that such an extraordinary situation would have resulted if the suit were brought in a Federal Court prior to the enactment of section 274(b) of the Judicial Code?

Respondent says:

> "There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the other party had knowledge of the falsity of his statements when he made them; in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief." (Brief of Respondent in Opposition to Certiorari 8.)

There are two answers to this contention. In the first place, the policy provides (R. 8):

> "The policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is endorsed upon or attached to this Policy when issued."

Recognizing the effect of the above provision and that because thereof respondent has to prove "knowledge of the falsity" of the answers, respondent charged and pleaded such knowledge (Para. 21 Aff't of Def. R. 16).

It is not necessary to cite cases to establish the proposition that a party must prove his case, as pleaded. In view therefore, of the contract and the charge in the affidavit of defense, it is difficult to understand how respondent can seriously advance the proposition that it has no adequate remedy at law in pleading as a defense, in the lawsuit, the alleged answers claimed to have been *knowingly and fraudulently* made and

that only a court of equity can give it adequate relief because in equity it can win its case by merely showing that the answers were material and untrue and without proof that they were made knowingly and with fraudulent intent. Surely they cannot mean that because they were able to get the order of court that this case be tried by a chancellor according to equitable procedure, they have gotten the issues made up by the pleadings changed in some manner, so that they did not have to prove *all* of the facts which they set out as their defense in the affidavit of defense.

"Innocent" fraud.

In the next place, it is difficult to conceive such a strange animal as an innocent fraud,—a fraud perpetrated without knowledge of the falsity of the fraudulent representation. If a man makes false statements, recklessly, and without any reasonable basis, he can be held to the same consequences as a man who makes false statements knowingly. He *is* a fraud for he is impliedly representing that he *knows* the facts with reference to certain matters when he does not. It is true that in the case of Smith vs. Richards, 38 U. S. 26, which was a bill to rescind a contract for the purchase of a gold mine because of fraudulent representations, the court said that even though the appellant made the representations under the influence of delusion, it is sufficient for the decision of *that* case if it be established that the representation was untrue in material parts of it. But the court, in Southern Development Company vs. Silva, 125 U. S. 247, where it dismissed a similar bill, stated that one of the elements necessary to be established was that the alleged false representation was not actually believed by the defendant, on reasonable grounds to be true.

What this court said in the Smith-Richards case, *supra*, on the subject of fraud applies as well in a case at law:

> "Whether the party thus misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial, for the affirmation of what one does not know, or believe to be true, is equally, in morals and *law*, as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive, for it operates as a surprise and imposition on the other party." (Italics ours.)

Can it be doubted that if a jeweler innocently misrepresents a watch-case to be solid gold, 18 karat fine, when as a matter of fact it is only gold-filled, or 14 karat fine, the purchaser may, on discovery of the fact, recover the money paid for the watch in an action at law?

Unfortunately, ill considered expressions are to be found in some cases to the effect that in law the complaining party must prove not only the falsity of the statements but that the party making them had knowledge of their falsity and that in equity the last element is immaterial. The answer to the apparent conflict in the cases is this: If a man makes representations of fact as regards a matter about which he has knowledge, or about which he is *presumed* to have knowledge, as when a man is "talking up" a piece of property of his, and describes its qualities and characteristics, and it appears that these representations were untrue, the contract will be rescinded in a court of equity, or the maker of the representations will be compelled, in a court of law, to refund the considera-

tion that he received as a result of the misrepresentations, regardless of whether he knew them to be false or not. But, on the other hand, when the misrepresentation consists of *an answer given in response to a question* and it is plain that the question is intended to elicit *the information that the party has* upon the subject, or an opinion, and nothing else, if the answer is given honestly and in good faith, he cannot be held for the incorrectness of the answer unless he makes his answer a warranty. When an insurance company, in its printed inquiries contained in the application, asks the applicant, for instance, whether he has cancer, the question can't be understood in any other way than to mean: "Have you cancer, to your knowledge, or in your opinion?" We all know that the disease is an insidious one and that a person having it may not suspect it until it is in an advanced stage. The insurance company certainly cannot be heard to say that it meant and expected to get an answer "Yes" from a man who did not suspect that he had cancer. It was in recognition of this principle that there was inserted in the policy the provision cited above: "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

While the exact question that was put to the defendant in the case of Southern Development vs. Silva, *supra*, was in dispute, yet the essence of it related to the extent of the work that had been done in the mine (p. 257), and when the intending purchaser asked the seller as to that, he must also be understood to have been inquiring as to the extent of the work done in the mine *according to the seller's knowledge*. He would

have been foolish to expect the seller to tell him of any work done in the mine of which the seller was ignorant. If the matter was sufficiently material to the purchaser, he could by agreement have made the answer a warranty. And as this was not done, the court held in that case that even though the representation was untrue, since it was not shown that the seller knew it was untrue, the contract would not be rescinded on that ground. The illuminating opinions in Kimber vs. Young, 137 Fed. 744 (C. C. A. 8th Cir.) and in New York Life Insurance Company vs. Miller, *supra*, will help to clear away the confusion. The cases merely hold that the action for deceit at common law is founded upon fraud and that the scienter must be proved. And it is equally necessary to prove deceit,—fraud—of which the scienter is an indispensable element, in a bill in equity, if deceit or fraud is therein charged. The Kimber case shows many instances of *charges* of fraud and deceit where the representation, upon a careful examination, proved to be only the expression of an opinion and not a representation of an alleged fact.

Sufficiency of testimony to go to jury not question before court.

We will not be drawn into a contest on the false issue which respondent sought to raise in his brief in opposition to the petition for writ of certiorari, viz: whether if this case be tried before a jury, the Court would be bound to direct a verdict for respondent. That is not the question before the Court, nor do we anticipate that the Court will examine the whole record as it would if it were reviewing the case to determine whether the trial judge was correct in instructing the jury to find for respondent. However, since the alleged fraud was

brought in, we want to call attention to just a few simple facts.

The assured was a Greek restaurant keeper, an "ignorant dumb foreigner", as one of respondent's own witnesses, a physician, admitted (R. 70). Another of respondent's witnesses, also a physician, testified that he could not carry on a conversation with the assured in English and used, in his talk with him, a few words of Greek that he knew (R. 85, 94). The assured applied for only $5,000 insurance (R. 218). The "defrauded" insurance company, following the well known custom, sent on *two* policies for $5,000 each, and, after succeeding in placing them, sent on two more unsolicited policies for $5,000 each which they persuaded the assured to accept (R. 129). How the insurance company's examining physician, who spoke only English, could make this ignorant man understand the intricate questions in the application which contained medical terms and difficult words and expressions is a puzzle.

The imposition upon this trusting insurance company must have been terrible. A glance at the application blank (R. 206, 209) will show that. Every question from 1 D to 11, both inclusive,—and they cover the whole subject of assured's habits, health and physical condition,—is answered in the negative. What a perfect specimen, from a physical, social and every other standpoint, they must have believed this 58 year old Greek restaurant keeper to be, for they always believe everything written in the application by their own agent, so they claim, no matter how unbelievable it may be to any one else. It would be interesting, if the assured were alive, to hear his version of what

happened; to learn whether even a third of the questions were put to him, whether the doctor explained to him the meaning of the questions that he was representing the assured as answering "no", whether the doctor asked him if he had ever in his life consulted a physician, for that is what questions 8 to 10 amount to, and, if he did, whether assured said that he had not.

Because it is a matter of public interest to protect and preserve the rights of beneficiaries of life insurance against just such claims by insurance companies, legislatures have made it compulsory for insurance companies to attach copies of the application to the policies so that the applicant might know what answers the agents wrote into the application. To circumvent the requirements of these statutes, the companies attach such microscopic photostats of the application that they either cannot be read at all or cannot be read except with considerable difficulty and eye-strain. The purpose is to discourage the reader. No legitimate reason can be given for these miniature copies. Interesting cases on the subject are New York Life Insurance Company vs. Halpern, 57 F. (2d) 200, affirmed 61 F. (2d) 1037, and New York Life Insurance Company v. Miller, *supra,* (p. 12 of Appendix).

In this connection, in New York Life Insurance Company vs. Miller, *supra,* the Circuit Court of Appeals held that there was no error in overruling defendant's motion for an instructed verdict, the court having submitted to the jury the question whether the copies of the application attached to the policies were legible copies.

Petitioner has always maintained his right to jury trial.

Present counsel for petitioner were not concerned in this case prior to the filing of the petition for the writ of certiorari, but the former counsel for petitioner filed an answer denying that respondent's defense was equitable and asserting that it was a defense of fraud triable at law. They also took an exception to the order of court directing the hearing before a chancellor (R. 35) and preserved their rights by assigning the order as an error (R. 245). There is nothing in their conduct that shows a waiver of their right of trial by jury.

> "In considering the question of waiver, a distinction must be made between an entire lack of matter of equitable cognizance, and cases within the field of equitable jurisdiction but in which an element essential to plaintiff's right to call upon the court for relief is lacking. Where the cause is entirely outside the field of equitable cognizance, the objection is not waived *by failure to interpose it at any particular time,* but is available at any stage of the proceeding." (Italics ours.)
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> 21 C. J. sec. 149 (p. 168);
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> Southern Pacific Co. v. U. S., 200 U. S. 341.

Finally, and to settle the matter, the lawfulness of the order directing this case to be heard before a chancellor according to equity procedure was litigated before the Circuit Court of Appeals and respondent did not there take the position, *which it advanced, for the first time,* in its brief in opposition to the petition for a writ of certiorari, that petitioner has waived his right to attack the order.

CONCLUSION.

If section 274 (b) of the Judicial Code is to be used as it was in this case, federal courts of equity will take away from courts of law jurisdiction over hundreds of cases wherein the right to trial by jury has never been questioned. It will be used in any case where the defendant claims fraud was practiced on him. It will be used even in cases where the defendant claims a breach of warranty or representation, for when we come to examine respondent's contention we find that it STARTS by claiming that it is entitled to go into equity because its defense of fraud is "equitable" and ENDS with arguing that it ought to be allowed in equity because, after it is there, it can abandon its claim of fraud and get along with proof of something else,—a breach of a representation.

Such a use of the statute is a perversion of its purpose. It was on the books for about fifteen years before it occurred to anyone to misuse it in this fashion.

Respectfully submitted,

CHARLES H. SACHS,

LOUIS CAPLAN,

Counsel for Petitioner.

APPENDIX.

United States Circuit Court of Appeals

EIGHTH CIRCUIT

No. 9918 at Law. October, 1934, Term.

NEW YORK LIFE INSURANCE COMPANY,
Appellant,

vs.

GERTRUDE V. MILLER,
Appellee.

Appeal from the District Court of the United States for the Northern District of Iowa.

Mr. Clifford V. Cox and Mr. Donald Evans (Mr. Wm. F. Riley and Mr. John Inghram were with them on the brief) Attorneys for Appellant.

Mr. L. H. Salinger (Mr. Edwin A. Wissler and Messrs. Salinger, Reynolds and Myers were with him on the brief) Attorneys for Appellee.

Before Booth, Circuit Judge, and Munger and Bell, District Judges.

Munger, District Judge, delivered the opinion of the Court.

The appellee had a verdict and judgment against the appellant in an action upon two policies of insurance. The parties will be referred to as they appeared in the trial court. The defendant's answer alleged that the assured had obtained the policies by making, knowingly, false representations, consisting of untrue answers to

questions propounded to him in his written application for the policies and the same facts were also alleged in a cross bill, with allegations that upon discovery of the falseness of the representations the defendant had tendered to plaintiff the premiums which it had collected and had notified her that it had elected to rescind the policies. The prayer asked for a decree of rescission of the policies and for general relief. In her replication to the cross bill, the plaintiff admitted that the assured had made the answers to the questions, as alleged, but denied their falsity and materiality, and denied that the policy was issued in reliance upon them. **It also alleged that the defendant had an adequate remedy at law. When the case was first reached for trial the defendant moved that the case be set for trial before the court on the equitable issues tendered for trial in the cross bill. This motion was overruled, and an exception noted.** Thereafter a jury was empanelled in the case and following this the plaintiff was given leave to amend her replication, and in her amendment the plaintiff alleged, in substance, that the copies of the application which were attached to the policies, when the policies were delivered to the assured, were not copies, because illegible. It does not appear that a verdict was reached by the jury at that time, but, one year later, a trial was had to a jury, resulting in the verdict and judgment mentioned.

It is assigned as error that the court overruled the defendant's motion asking for a trial of the equitable issues set forth in the cross bill before the trial of the legal issues. **The trial court held that the defendant had an adequate remedy at law.** The appellant's claim that this was erroneous finds some support in the case of New York Life Insurance Company v. Marotta, 57 Fed. (2d) 1038, 1039. In that case it appeared that an action at law had been brought to recover upon two life insurance policies, after the death of the insured. The defendant's answer alleged that the policies were procured by means of false and fraudulent answers given by the insured to questions propounded to him in his application for the

insurance, and prayed for a rescission and cancellation of the policies. The trial court made an order dismissing the equitable defenses because the defendant had an adequate remedy at law, but this order was reversed by the Court of Appeals. The reason for the reversal was stated in this language:

> "There is a clearly marked difference in the elements of proof necessary to support fraud as a defense to an action at law, and fraud as a ground for the equitable relief of rescission and cancellation. This distinction the court did not appear to recognize. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party, at the time when he makes it; but the courts have clearly and repeatedly recognized that there may be actual fraud in equity, without any feature of moral culpability.
>
> The person making an untrue statement without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity. Of course, whatever would be fraudulent at law is fraudulent in equity; but the equitable doctrine goes further, and includes instances of fraudulent misrepresentations which do not exist at law. At law there must be a showing, not only of the falsity of the allegation, but also knowledge by the applicant of such falsity. As a general rule, courts of equity may grant relief by way of rescission, abatement, or otherwise, although no fraudulent intent on the part of the person making the representation is shown, and even though he may be honestly misled as a result of misapprehension or mistake. All that need be shown in such case is that the representations were false, and actually misled the person to whom they were made. A very large number of cases sustaining these distinctions are set forth in the appellant's brief, and need not be cited here. These authorities sustain the distinction which exists between fraud at law and fraud in equity so clearly as to remove the question beyond the domain of controversy. While it pretty clearly appears from the record that a number of the material questions answered by the applicant were untrue, under all the circumstances, there being a conflict of evidence, we think the court was right in submitting the

question to the jury as to the existence or nonexistence of legal fraud; particularly as to whether or not the applicant was suffering from, and had been treated for, gout, and, if so, whether he had knowledge of the fact that he was treated for that disease. But that is only a portion of the case. Either prior to the submission of the case to the jury, or afterwards, under the pleadings, it was the duty of the court to find the facts upon which the equitable defenses were based, and, if the findings showed that the applicant's answers were untrue and material, it was the duty of the court to apply to those facts the equitable principle that such false representations were fraudulent, and entitled the defendant to a rescission of the policies, even though the applicant believed the answers to be true when he made them."

In Derry v. Peek, 14 App. Cases, 337, 359, Lord Herschell stated the distinction in the elements of proof between actions at law for deceit, and suits in equity for rescission, as follows:

"This action is one which is commonly called an action of deceit, a mere common law action. This is the description of it given by Cotton, L. J. in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and must be relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit."

In McFerran v. Taylor, 3 Cranch 270, which was a suit for specific performance, Chief Justice Marshall said:

> "He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain liable for that variance."

The case of Smith v. Richards, 13 Pet. 26, was a suit for a rescission of a contract to purchase a tract of land, upon which was a gold mine, upon the ground, alleged by the purchaser as the plaintiff, that he had been induced to make the contract by false representations of the seller. The court said:

> "It is an ancient and well-established principle, that whenever suppressio veri or suggestio falsi occur, and more especially both together, they afford a sufficient ground to set aside any release or conveyance. This ancient principle, thus expressed with so much sententious brevity, is laid down in terms somewhat more comprehensive, and having a direct bearing on the present case, by a modern text-writer on equity. In 1 Madd. Chan. 208, it is thus stated: If, indeed, a man, upon a treaty for any contract, made a false representation, whether knowingly or not, by means of which he puts the party bargaining under a mistake upon the terms of bargain, it is a fraud, and relievable in equity. The doctrine thus laid down is almost in the very words used by the chancellor, in the case of Neville v. Wilkinson, L Bro. C. C. 546, with the exception of the words, whether knowingly or not; and the part of the proposition embraced by these words, is founded upon the case of Ainslie v. Medlycott, 9 Ves. 21, which fully sustains Mr. Maddock. In this latter case, the following strong language is used. 'No doubt, by a representation, a party may bind himself just as much as by an express covenant. If, knowingly, he represents what is not true, no doubt, he is bound. If, without knowing that it is not true, he takes upon himself to make a representation to another, upon the faith of which that other acts no doubt he is bound; though his mistake was perfectly innocent.'
>
> But the doctrine is laid down with more comprehensiveness and precision by a still more modern writer

on equity; one who gives us, in the form of distinct propositions, what he considers the result of the various cases on the subject, and marks, with particularity, the modifications which belong to it. In 1 Story's Equity, 201-2, it is thus stated. 'Where the party, intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case, there is a positive fraud, in the truest sense of the terms; there is an evil act, with an evil intent; dolum malum, ad circumveniendum. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as by positive assertions.' Whether the party thus misrepresenting a fact, knew it to be false, or made the assertion, without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know, or believe to be true, is equally, in morals and law, as unjustifiable, as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact, by mistake, it is equally conclusive; for it operates as a surprise, and imposition on the other party. Or, as Lord Thurlow expresses it, in Neville v. Wilkinson, 'it misleads the parties contracting, on the subject of the contract.'"

The principle stated in these cases that it is immaterial in an equitable suit for rescission or cancellation of a contract, whether the false representation inducing its execution was made with knowledge of its falsity or was made with an honest belief that it was true, has been stated in many decisions in the Courts of the United States. Doggett v. Emerson, 3 Story 700, Fed. Cases 3960; in re American Knit Goods Mfg. Co., 173 Fed. 480, 482; Grant v. Giffrida, 267 Fed. 330, 332; New York Life Ins. Co. v. Marotta, 57 Fed. (2d) 1038, 1039; Kell v. Trenchard, 142 Fed. 16, 23; Halsey v. Minnesota-South Carolina Land & Timber Co., 28 Fed. (2d) 720, 723; Franco v. New York Life Ins. Co., 53 Fed. 562, 565; Hindman v. First Nat. Bank, 112 Fed. 931, 944; Joslyn v. Cadillac Automobile Co., 177 Fed. 863, 867; Independent Harvester Co. v. Tinsman, 253 Fed. 935, 937; Hersch-

berger v. Woodrow-Parker Co., 275 Fed. 908, 916; Billings v. Aspen Mining & Smelting Co., 51 Fed. 338, 347; Kimber v. Young, 137 Fed. 744, 747; City of Omaha v. Venner, 243 Fed. 107, 113; Fay v. Hill, 249 Fed. 415, 419; Woods-Faulkner & Co. v. Michelson, 63 Fed. (2d) 569, 572. See also Hare v. Chase, 49 Fed. (2d) 447, 454; Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 Fed. 888, 892; Benton v. Ward, 47 Fed. 253, 256; Burroughs Add. Mach. Co. v. Scandinavian-American Bank, 239 Fed. 179, 183.

In the case of Insurance Co. v. Bailey, 13 Wall. 616, the insurance company after the death of the assured had filed a bill asking for the cancellation of two policies of insurance which it had issued upon the life of Albert Bailey. The bill alleged that the policies had been procured by the suppression of material facts and by fraudulent misrepresentations. In affirming a dismissal of the bill the court said:

> "Whether the remedy sought in this case would have been available if the suit had been instituted before the death of the person whose life was insured it is not necessary to determine, as no such question is involved in the record. Suffice it to say upon that topic that the complainant has not referred the court to any decided case which supports the affirmative even of that inquiry, but the difficulty in the way to such a conclusion in the case before the court is much greater, as by the death of the cestui que vie the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the policies and the sums insured became a purely legal demand, and if so, it is difficult to see what remedy, more nearly perfect and complete, the appellants can have than is afforded them by their right to make defense at law, which secures to them the right of trial by jury. (* Foley v. Hill, 2 House of Lords Cases, 45; Thrale v. Ross, 3 Brown's Chancery Cases, 56; Arundel v. Holmes, 4 Beavan, 325; Norris v. Day, 4 Young & Collyer, 475.

> Where the party, if his theory of the controversy is correct, has a good defense at law to 'a purely legal demand,' he should be left to that means of defense, as he had no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy. Nothing of the kind is to be apprehended in this case, as the contracts, embodied in the policies, are to pay certain definite sums of money, and the record shows that an action at law has been commenced by the insured to recover the amounts, and that the action is now pending in the court whose decree is under reexamination.
>
> Courts of equity unquestionably have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts in matters of contract, but where the cause of action is 'a purely legal demand,' and nothing appears to show that the defence at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal court, as it is clear that the case, under such circumstances, is controlled by the sixteenth section of the Judiciary Act."

In the case of Cable v. United States Life Insurance Company, 191 U. S. 288, the insurance company had brought suit in the United States court seeking cancellation of a policy of life insurance which it had issued on the life of Herman D. Cable, alleging that the policy had been procured by fraud and by false representations. Before that suit was filed an action had been begun in the State court, by the beneficiary in the policy, asking for a recovery upon the policy. The bill alleged the lack of an adequate remedy at law, in that a removal of the action on the policy was impracticable, because an Illinois statute declared that a removal of such a case would forfeit the company's right to transact business in Illinois; and alleged that the laws of Illinois, as interpreted by the State courts, were less favorable, on the facts of the case, than the laws applied in the United States courts. In its decision the Supreme Court stated that the plaintiff's bill had alleged that the policy was procured by the fraud and fraudulent representations of the agents

of the assured, and dismissed the question of the adequacy of any remedy at law, referring to the decision in the Bailey case as controlling. The court said:

> "We start with the proposition that, to any action brought upon the policy in a Federal court, the company would have a complete and adequate defense by proving the fraud as alleged in the bill herein. That shows a defense in the same jurisdiction resorted to by the complainant herein. It is answered, however, that the action has not been commenced in the Federal court, but, on the contrary, the administratrix has commenced her action in the state court, and hence the defence, if made in the state court, is not in the same jurisdiction as that in which the bill in this case was filed. But the company may bring its defence within the same jurisdiction by removing the case from the state to the Federal court, which it has the right to do on account of the diversity of citizenship of the parties thereto. No stipulation or agreement, founded on a state statute or otherwise, which the company may have entered into could prevent the removal of the case in the exercise of its constitutional right. This has been so held in Insurance Co. v. Morse, 20 Wall. 445, and that case has been repeatedly approved. See Doyle v. Continental Insurance Co., 94 U. S. 535; Barron v. Burnside, 121 U. S. 186.
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> * * * * * * * * *
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> One thing is entirely clear, that the company could have removed this case from the state to the Federal Court, notwithstanding the state statute or anything contained in its application for a license to do business within the state. Upon removal the company would have the full and adequate defense under the law as administered by the Federal courts that it would have in the equity case."

In the decision the court referred approvingly to the cases of Home Ins. Co. v. Stanchfield, 1 Dillon 424, Fed. Cases 6660, and Aetna Life Ins. Co. v. Smith, 73 Fed. 318, in each of which the court had declared that bills to cancel insurance policies on the ground of false representations could not be maintained because the remedy at law was adequate, when the bill was filed after a loss had occurred under the policy.

Before the decision in the Marotta case, it had been held, in cases which cited the Bailey and Cable cases that an insurance company ordinarily had an adequate remedy at law, by setting up its defense in an answer alleging that the policy had been procured by false representations, when an action had been begun against it on the policy, after a loss had occurred under the policy. Continental Casualty Co. v. Yerza, 16 Fed. (2d) 473, 474; New York Life Ins. Co. v. Marshall 23 Fed. (2d) 225; New York Life Ins. Co. v. Feight, 29 Fed. (2d) 318, 320; New York Life Ins. Co. v. Seymour, 45 Fed. 47, 48; Riggs v. Union Life Ins. Co., 129 Fed. 207, 208.

The right to maintain an equitable action to rescind or cancel a contract of insurance, because of false representations made by the assured to induce its execution, where there is no adequate remedy at law, is well recognized. Riggs v. Union Life Ins. Co., 129 Fed. 207; Jefferson Standard Life Ins. Co. v. Keeton, 292 Fed. 53, 54; Jefferson Standard Life Ins. Co. v. McIntyre, 294 Fed. 886, 888; Jones v. Reliance Life Ins. Co., 11 Fed. (2d) 69, 70; Peake v. Lincoln Nat. Life Ins. Co., 15 Fed. (2d) 303, 305; Keystone Dairy Co. v. New York Life Ins. Co., 19 Fed. (2d) 68, 69; New York Life Ins. Co. v. McCarthy, 22 Fed. (2d) 241, 245; Adler v. New York Life Ins. Co., 33 Fed. (2d) 827; New York Life Ins. Co. v. Hurt, 35 Fed. (2d) 92, 96; Lincoln Nat. Life Ins. Co. v. Hammer, 41 Fed. (2d) 12, 16; Equitable Life Assur. Soc. of U. S. v. Schwartz, 42 Fed. (2d) 646, 648; New York Life Ins. Co. v. Seymour, 45 Fed. (2d) 47, 48; Brown v. Pacific Mut. Life Ins. Co., 62 Fed. (2d) 711, 712; Phillips-Morefield v. Southern States Life Ins. Co., 66 Fed. (2d) 29, 30; Penn Mut. Life Ins. Co., v. Joseph, 5 Fed. Supp. 1003, 1006; Massachusetts Protective Ass'n v. Stephenson, 5 Fed. Supp. 586, 590.

The right to maintain such a suit, as illustrated by the cases cited, often arises from the fact that a defense at law in an action on the policy may be lost to the insurer, because of the uncertainty when a loss may occur, the danger that witnesses may disappear, or because the

policy will become incontestable after a limited period unless such a suit is begun by the insurer.

If an insurer is entitled to ask the equitable relief of rescission or cancellation of a policy which it has issued, on the ground that it was procured by fraudulent representations of the insured, solely because the elements of proof in such a suit differ from the elements of proof in making the defense in an action on the policy, it is needless in any case to bring suit for that relief before the incontestable period has expired, or before a loss has occurred, or to show that essential testimony may be lost, or to show that any other special circumstances exist, and the insurer would be entitled to make such an equitable defense in every case, **where suit was brought upon a policy. While the exact question was not discussed in the Bailey or Cable cases, or in the cases which have followed those decisions, it must be presumed that the courts were aware of the essential elements of the suits for rescission or cancellation of instruments as contrasted with the elements of a defense at law.** While recognizing the force of the reasoning in the Marotta case, on the authority of the decisions in the Bailey and Cable cases and the cases which have cited and followed them, we are constrained to hold that it was not erroneous for the trial court to refuse a trial of the alleged equitable issues, because of the nature of the proofs required of the defendant in making a defense in the law action, and there being neither allegation or proof that the policies were issued as the result of mistake. The policies in suit by their terms were incontestable after two years from the date of issue, except for non-payment of premiums, and except as to provisions for disability and double indemnity benefits. This action was begun, and the defendant's answer and cross bill were filed before the two year period had expired. The defendant having thus instituted a contest of the policy within the time limited, was not entitled to the equitable relief asked because of the possibility that the plaintiff might dismiss her action and begin a new one on the policies after the

two year period had expired. New York Life Ins. Co. v. Hurt, 35 Fed. (2d) 92, 96; Powell v. Mutual Life Ins. Co., 313 Ill. 161, 170, 144 N. E. 825.

Complaint is made that the court should have sustained the defendant's motion for a directed verdict. The court submitted the case to the jury with instructions to find for the defendant company unless the jury found that the copies of the applications attached to the policies were legible copies, such that a person with undefective eyes and normal vision could read with a fair degree of certainty. Section 8772 of the Code of Iowa (1931) in force at the time this insurance was written required that a company issuing a life insurance policy should attach or endorse thereon a true copy of any application or representation of the assured, which by the terms of the policy were made a part of it, or of the contract of insurance, or referred to therein, or which might in any manner affect the validity of the policy, and Section 8773 of the Code provided that if any insurance company neglected to comply with the requirements of the preceding section, it should be precluded from pleading, alleging or proving such application or representations or any part thereof, or the falsity thereof, or any part thereof in any action upon such policy.

Appellant claims that a verdict for the defendant should have been directed because it was undisputed that a true copy of the original application was attached to the policies delivered to the assured, and that it could be read by a person with undefective eyes and normal vision.

The record shows that the original application made by the assured was identified and offered and received in evidence. This exhibit is not preserved in the record on this appeal. The original policies delivered to the assured, with the copies of the applications attached are presented by the record. We are precluded by this condition of the record from a comparison, available to the court below, of the contents of the original application with the contents of the alleged copies delivered to the assured. The parts of the original policies, alleged to be

copies of the original application appear to be photographic reproductions of an application signed by the assured. The questions, and some other portions of it are in printed form, while the answers, and the purported signature of the assured and of the medical officer are in handwriting. **A large part of the answers can barely be read by means of a strong magnifying glass owing to the small size and dimness of the letters.** The missing exhibit, the original application, may have demonstrated that it was printed and written on sheets of larger size, and with larger printed and written words, legible to any ordinary reader. **It is obvious, from a casual inspection of the policies, that a large portion of the papers attached as copies of the application, were not capable of being read by persons of normal vision, without the aid of some magnifying instrument.** As to the further claim that the statute is obeyed, if the copy of the original application attached to a policy and delivered to the assured is a true copy of its contents, regardless of its legibility, this would not be the test, if the original is plainly printed and written, in letters of fair size and easily legible, while the copy furnished is so reduced in size, or so dim or blurred that it can be read by persons of normal vision only by the use of strong magnifying glasses. Fidelity Mut. Ins. Co. v. Preuser, 195 Ky. 271, 274, 242 S. W. 608; Arter v. Northwestern Mut. Life Ins. Co., 130 Fed. 768, 769. There was no error in overruling the defendant's motion for an instructed verdict.

Other errors assigned challenge that part of the instructions of the court by which he told the jury that a true copy of the original application, must be a legible copy, such as a person with undefective eyes and normal vision could discern the writing upon and could read with a fair degree of certainty. The only ground of exception taken to this portion of the instructions was that the test of compliance with the statute was not whether the copy could be read, but whether it was a true copy, and that the portion of the charge defining the person who would be the judge of the ability to read the true copy was

immaterial. In Eastman v. Metropolitan Life Ins. Co., 228 Mich. 125, 129, 199 N. W. 655, the court said in discussing a similar statute:

> "The test which the court laid down by which the jury was to determine whether the copy was legible was 'whether it may be read by a person of normal eyesight under normal conditions and with reasonable ease.' We think this was a proper test and, undoubtedly, one which was contemplated by the Legislature when the act was passed. It would be idle for the Legislature to prescribe a notice to be posted that could not be read by the normal eye under normal conditions. In the present case the provision that a copy of the application should be attached to the policy was inserted for a purpose, and that purpose was to enable the insured to know at all times just what representations he had made to obtain the insurance (New York Life Ins. Co. v. Hamburger, 174 Mich. 254, 140 N. W. 510), and thereby lessen the controversies which were continually arising after the death of the insured over claimed fraudulent representations made by him to obtain the insurance."

In Jununas v. Metropolitan Life Ins. Co., 239 Mich. 150, 153, 214 N. W. 117, it was said in a similar case:

> "Whether the reduced size photographic copy of the application attached to the policy serves the purpose of the statute involves the question of whether it can be read by a normal eye, under normal conditions, with reasonable ease. If it cannot be read by a normal eye, under normal conditions, with reasonable ease, then to hold it a compliance would render the statute meaningless."

We think these cases express the true rule applicable in this case, and that there appears to be no error in the giving of the instruction of whether the appellant may complain. These are all of the errors assigned that present any substantial question for review, and therefore the judgment will be affirmed.

(Bold face type ours.)

Filed October 25, 1934.